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6 INSURANCE COMPANY

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

12 AMERICAN MOTORISTS INSURANCE
13 COMPANY, an Illinois corporation,

14 Plaintiff,

15 v.

16 CRP CONSTRUCTION COMPANY;
17 DMA GILROY PARTNERS, LLC;
18 RONALD DANIELS; STATE OF
19 CALIFORNIA; CALIFORNIA
20 DEPARTMENT OF
TRANSPORTATION; CITY OF GILROY;
21 CHRISP COMPANY; KEITH B.
HIGGINS AND ASSOCIATES, INC.;
22 ROBERT F. ENZ CONSTRUCTION,
INC., and DOES 1 through 30,

23 Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY JUDGMENT**

JURY DEMANDED

25
26 Plaintiff American Motorists Insurance company ("AMICO"), by and through its
27 attorneys, Pierce & Shearer, LLP, for its Complaint for Declaratory Judgment against
28

Defendants CRP Construction Company (“CRP”) and DMA Gilroy Partners, LLC (“DMA”), states as follows:

INTRODUCTION

1. Plaintiff AMICO brings this action for declaratory judgment pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure. As set forth herein, there is an actual, substantial, and continuing justiciable controversy between AMICO and Defendants of sufficient immediacy and reality so as to require a declaration of rights by this Court.

2. AMICO seeks a declaration that it has no duty to defend or indemnify CRP and DMA in a lawsuit alleging that CRP and DMA, general contractors hired to perform off-site roadway and traffic signal improvements in Gilroy, California, are liable for the alleged negligent placement of road signs which proximately caused a motorcycle accident and resulting personal injuries to the underlying plaintiff.

3. AMICO has no duty to defend or indemnify CRP or DMA in the underlying action because neither CRP nor DMA are named, or additional, insureds under the AMICO insurance policy effective during the time of the underlying accident.

4. In addition, because a “professional services” exclusion applies to the named insured under the relevant insurance policy, even if CRP and DMA are each deemed to be insureds, they are both subject to the same exclusion applicable to the named insured and no coverage will be afforded.

5. The defendants named herein, other the CRP and DMA, are named solely to

1 the extent they are necessary parties to this dispute and no relief is sought from them and
2 AMICO will dismiss them if those parties will stipulate to be bound by the determinations
3 of this court in respect to the declaratory relief sought in respect to CRP and DMA.
4

5 ***JURISDICTION AND INTRADISTRICT VENUE***

6 6. This Court has jurisdiction over the present matter pursuant to 28 U.S.C.
7 §1332(a), as this action is between citizens of different states and the amount in
8 controversy in the underlying lawsuit, which is the subject of this action, exceeds
9 \$75,000, exclusive of interest and costs.
10

11 7. Venue is proper in the Northern District of California, San Jose Division,
12 pursuant to 28 U.S.C. §1391(a), as the alleged acts giving rise to the underlying claim
13 herein occurred in Santa Clara County, which is located within the Northern District of
14 California, and one of the Defendants (CRP) maintains its principal place of business in
15 Santa Clara County.
16
17

18 ***THE PARTIES***

19 8. AMICO is an entity incorporated under the laws of the State of Illinois.
20 AMICO is in the business of providing property-casualty insurance and risk management
21 services, including, without limitation, a wide array of business and personal insurance
22 products.
23

24 9. Upon information and belief, CRP is a California corporation with its
25 principal place of business in the County of Santa Clara, California. CRP is in the
26 construction business.
27
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12. The true names and capacities of defendants DOES 1 through 30 are unknown to Plaintiff. Plaintiff is also unaware of facts giving it a cause of action against DOES 1 through 30 as is unaware of the law that give s it a cause of action against DOES 1 through 30. Plaintiff, therefore, sues these defendants by fictitious names. Plaintiff will seek leave of court to amend this complaint to assert the true names and capacities of the fictitiously named defendants when they are ascertained.

13. CRP and DMA are named defendants in an action pending in the Superior Court of California – Santa Clara County, captioned *Ronald Daniels, et al. v. State of California, et al.*, corresponding with case number 1-04-CV-013479 (the “Action”). The matter was initiated by Ronald Daniels (“Daniels”) on January 29, 2004.

1 14. The Action arises from alleged injuries that Daniels suffered on June 28,
2
3 2003 in connection with a motorcycle accident on a stretch of Hecker Pass Highway
4 adjacent to the Village Green Estates development.

5 15. On December 11, 2006 and January 22, 2007, respectively, Daniels
6 amended his complaint in the Action to identify certain "Does" (including CRP and
7 DMA, among others); however, no new or revised allegations were submitted. (The
8 initial complaint and its amendments are collectively referred to as the "Complaint.")
9

10 16. The Complaint asserts counts for general negligence and premises liability.
11 (A copy of the Complaint is attached hereto as Exhibit C.)
12

13 17. Specifically, the Complaint alleges the following bases for general
14 negligence:

15 Plaintiff injured himself in a motorcycle accident that
16 resulted from a sign pole being bent into traffic and into the
17 roadway. The [Defendants] knew, or should have known,
18 about the sign being bent into traffic and the roadway.
 (Exhibit C, at p. 4.)

19 18. The Complaint also provides the following description of the
20 circumstances of injury for the premises liability cause of action:

21 Plaintiff injured himself in a motorcycle accident that resulted
22 from a sign pole being bent into traffic and into the roadway.
23 The accident occurred on Hecker Pass Highway. The sign
24 was originally erected and should have been properly
25 maintained by the State of California, Cal Trans [or both].
26 The damaged roadway sign was on the property of the State
27 of California, Cal Trans, etc. The State of California, Cal
28 Trans, City of Gilroy and Does 1-50, inclusive, knew, or
 should have known, about the sign being bent into traffic and
 the roadway. (Exhibit C, p. 5.)

AMICO'S POLICY

19. AMICO issued a Kemper Premier Businessowners Special Policy to Keith B. Higgins & Associates, Inc. ("Higgins") covering the period from November 20, 2002 through November 20, 2003 (Policy Number 7RS 668 450-02) (the Primary Policy"). (A copy of the Primary Policy is attached hereto as Exhibit D.)

20. As reflected therein, the Primary Policy contains a \$1 million per occurrence limitation of liability and a \$2 million aggregate limit. Additionally, with respect to the same applicable coverage period, and under the same policy number, AMICO issued commercial catastrophe coverage (*i.e.*, excess/umbrella coverage) which carried limits of \$1 million per occurrence and \$1 million in the aggregate and contained the same or similar relevant terms, conditions and exclusions as the Primary Policy (the "Catastrophe Policy"). (A copy of the Commercial Catastrophe Policy is attached hereto as Exhibit E.) The Primary Policy and the Commercial Catastrophe Policy are referred to herein as the "Policies."

COUNT I – DECLARATORY JUDGMENT***(Against CRP and DMA)***

21. AMICO realleges and incorporates by reference Paragraphs 1 through 20 above.

22. Higgins is the named insured on the Policies.

23. CRP is not identified as an insured or "additional insured" anywhere in either of the Policies.

1 24. DMA is not identified as an insured or “additional insured” anywhere in
2 either of the Policies.

3
4 25. Upon information and belief, CRP and DMA also are not an owner, lender,
5 director, officer, employee or agent of Higgins.

6 26. Under Section C of the Primary Policy, Who Is An Insured, subparagraph
7 5, provides in relevant part:
8

9 5. Additional Insured -- by Contract, Agreement or Permit

10 Any person or organization (named above) to whom
11 or to which you are obligated **by virtue of a written**
12 **contract, agreement or permit to provide such**
13 **insurance** as afforded by this policy is an insured, but
only with respect to liability arising out of:

- 14 a. “Your work” for that insured by you, including
15 work or operations performed on your behalf for
16 that insured;
17 b. Permits issued by state or political subdivisions
18 for operations performed by you; or
19 c. Premises you own rent, occupy or use.

20 (Exhibit D, Kemper Premier Endorsement for
21 Architecture and Engineering Firms, at p. 7.)
[Emphasis added.]

22 27. Likewise, the Catastrophe Policy provides in Section III, Who Is An
23 Insured, under subparagraph 3, that “anyone who is an insured under the ‘underlying
24 insurance’ [the Primary Policy] is an insured, but only to the extent the ‘underlying
25 insurance’ applies.”
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1 28. Like the Primary Policy, the Catastrophe Policy also provides in Section
2 III, Who Is An Insured, under subparagraph 4:

3 Any person or organization to whom or to which you are
4 obligated by virtue of a written contract to provide such
5 insurance as afforded by this Coverage Part is an insured, but
6 only with respect to liability arising out of "your work," "your
7 product" and to property owned or used by you.

8 (Exhibit E, at p. 9.)

9 29. CRP and DMA have claimed that Higgins had a written contract to provide
10 the insurance that exists under the Policies and, therefore, they have claimed that they are
11 additional insureds under the Policies.

12 30. Based on CRP and DMA's claims for coverage under the Policies, Higgins
13 never entered into any agreement or contract, in writing, reflecting an obligation to
14 provide insurance for the general contractor (CRP/DMA) responsible for the Santa Clara
15 roadway project and AMICO is unaware of any such agreement or contract. Therefore,
16 AMICO has denied coverage to CRP and DMA fully reserving its rights.

17 31. Thus, neither CRP or DMA is an insured or "additional insured" under the
18 Policies and there is no coverage afforded to either party under the Policies.

19 32. In addition, the Primary Policy contains the following "professional
20 services exclusion":
21

22 j. Professional Services

23 [This insurance does not apply to:] "Bodily injury,"
24 "property damage," "personal injury" or "advertising
25 injury" due to rendering or failure to render any
26 professional service. This includes but is not limited
27 to:
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...

(2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;

(3) Supervisory, inspection or engineering services...

(Exhibit D, Businessowners Liability Coverage Form, at p. 5.)

33. Likewise, the Catastrophe Policy contains the following "professional services exclusion" that provides, in relevant part that the Catastrophe Policy does not apply to:

p. Professional Liability

"Bodily injury," "property damage," "personal injury" or "advertising injury" due to rendering or failure to render any professional service. This includes but is not limited to:

...

2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;

3) Supervisory, inspection or engineering services;

(Exhibit E, at p. 8.)

34. Higgins was hired solely to perform the design of off-site improvements at and around the Village Green Estates residential development. (*See generally*, Exhibits A and B.) These services included, without limitation, data collection, utility and survey data, data review and site visits, project coordination, and development of base plans and conceptual improvement plans. (*See Id.*)

REQUEST FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury as to all issues so triable.

Dated: October ____, 2007

Respectfully Submitted,

PIERCE & SHEARER, LLP

By: _____

Stacy A. Smith

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